

EXHIBIT G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PETTER INVESTMENTS, INC., a
Michigan corporation,

Plaintiff,

v.

File No. 1:07-CV-1033

HYDRO ENGINEERING, INC., a Utah
corporation, and HYDRO ENGINEERING
EQUIPMENT & SUPPLY CO., a Utah
limited liability company,

Defendants.

Markman Hearing

Before

THE HONORABLE GORDON J. QUIST
United States District Judge
December 17, 2008

Kevin W. Gaugier, CSR-3065
U.S. District Court Reporter

APPEARANCES

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December 17, 2008

10:06 a.m.

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P R O C E E D I N G S

THE COURT: Good morning, counsel. Good morning, everybody else. No, you may be seated.

We're here in the case of Petter Investments, Inc., and others against Hydro Engineering, Inc. and others, case number 1:07-CV-1033, time set for several motions, Markman hearing, motion for summary judgment on equitable estoppel, and motion for summary judgment on the merits. Can I have the appearance of counsel, please?

MR. RATH: Yes, Your Honor. Eugene Rath from Price Heneveld for plaintiff, Petter Investments.

THE COURT: Thank you.

MR. FOSTER: Brett Foster appearing on behalf of defendants.

MR. MILLER: Mark Miller appearing on defendants' behalf.

MR. GAFFIN: Rick Gaffin for defendants.

THE COURT: Okay. Who's going to be the primary spokesperson for the defendants?

1 MR. FOSTER: We're going to break it up, Your Honor,
2 if you will allow. I will handle the summary judgment
3 motion. Mr. Miller will handle claim construction on the
4 Hydro Engineering patents.

5 THE COURT: All right. What I'm going to do is
6 change what I thought initially because there's so much here.
7 I mean, every little term and everything we could fight about
8 and we'd probably be here for the rest of our lives, so -- and
9 I've got other things to do, obviously.

10 I have worked hard on it, but I'm really prepared on
11 the '592 patent and somewhat prepared on the Hydro patents.
12 And regarding the Markman hearing on the Hydro patents, it's
13 my proposal that rather than listen to you and your not
14 knowing where I'm coming from is to give you some of my
15 tentative thoughts regarding the claim construction as to
16 those patents, that's the Hydro patents, the '591 and '749
17 patents, and then have another time where you can appear by
18 telephone or in person to argue with me about that. Otherwise
19 I think we would be spinning our wheels a lot here today
20 because I'd forget at the end what we talked about at the
21 beginning.

22 Having said that, I'm wondering whether or not it
23 wouldn't be possible for the parties to really focus me in on
24 the claims in the Hydro patents that they think are critical.
25 In other words, rather than argue about things that may or may

1 not be critical, and oftentimes in these cases it's been my
2 experience that, you know, patent lawyers like to fight about
3 everything, but some things really don't make a big
4 difference, and it seems that they all sort of -- they start
5 out with twenty things they want to argue about and then you
6 finally get to the final pretrial or something and say, Well,
7 Your Honor, there are only three or four things that really
8 make a difference here. So -- and I'm talking to you so that
9 you can respond to me.

10 So my thought is to give you like fourteen days to
11 get me focused in on -- although I have read it; I've read
12 them and I've got some preliminary thoughts -- to focus me in
13 on what you think are the really critical claims in the Hydro
14 patents. And then I will give you tentative, and I mean
15 tentative, thoughts regarding claim construction within
16 another fourteen days, and then you can handle it from then on
17 as you wish, either another oral argument, and in these cases
18 oral argument is not really very effective, and I'll get into
19 that in a minute too, and then, you know, make a decision.

20 Mr. Rath, what's your gut reaction to that?

21 MR. RATH: I think that's fine, Your Honor. A
22 couple things. You wanted to hear from both parties, I
23 assume, within fourteen days?

24 THE COURT: Yes, yes. And if you guys -- I mean,
25 you guys are good lawyers. You practice in this area a lot.

1 Talk to each other and say, you know, Gene or whatever he
2 calls you, you know, let's focus in on this. This is the
3 critical issue. Like I think vacuum pump is the critical
4 issue in the '792 patent.

5 MR. RATH: Right.

6 THE COURT: Right. So this is what we are talking
7 about, and then I can give you tentative conclusions on all of
8 them. But if you focus me in on those, that would be helpful,
9 I think, to get you guys going.

10 MR. RATH: We will do that, Your Honor, and we
11 received some exhibits earlier this week that I think is going
12 to resolve a couple issues at least, moot them, so I think
13 that will narrow it down too somewhat. But we will certainly
14 do that for you.

15 THE COURT: Okay. Mr. Foster, what's your reaction
16 to that?

17 MR. FOSTER: Let me --

18 THE COURT: Oh, Mr. Miller, go ahead.

19 MR. MILLER: Your Honor, with regard to the Hydro
20 patents, my argument today, I was prepared to do a pretty
21 minimal argument that would just be saying in our opinion here
22 are the critical three or four things in the Hydro patents
23 that should be focused on. So were you asking us to kind of
24 give us -- give you that today a little bit?

25 THE COURT: No, I don't want anything on the Hydro

1 patents today. I'm sorry that you spent your time coming
2 here, but nonetheless, maybe it's good that you can see where
3 I'm coming from. But talk to Mr. Rath, and if you guys can
4 get together and file it within fourteen days, you can file it
5 jointly, you can file it separately. It doesn't make any
6 difference. Joint seems to make more sense. But these are
7 the things that are really critical, and we'll really focus in
8 on those, and then, Mr. Miller, you can come here and Mr.
9 Foster can stay home, whatever, instead of both of you here.
10 So whatever, so we will do it that way, then.

11 MR. MILLER: Perfect.

12 THE COURT: And then we can pay close attention to
13 those things. I mean, I've got a list here that goes on and
14 on and on with all of this stuff, and by the time we got
15 three-quarters of the way through, like I said earlier, I'd
16 forget what we talked about at the beginning. But if I do it
17 that way, then I will be more focused on it.

18 All right. Let's go forward, then, with the '592
19 patent, and I want the parties to address first the claim for
20 equitable estoppel, and I guess, Mr. Foster, you're going to
21 talk about that. What is not going to be helpful today is
22 going to be the presentation you planned to make, you know,
23 the brilliant oratory and everything else. What will be more
24 helpful to me is if you could answer just a couple of
25 questions.

1 And by the way, my hearing is shot, so it would be
2 helpful if you -- since November 5. The court reporter and my
3 law clerks are sick of hearing about it. My wife is sick of
4 hearing about it, but you guys ought to know. Talk into the
5 speakerphones. It would be very helpful.

6 You would agree with me, I think, that equitable
7 estoppel by its very definition is a matter of the Court's
8 conscience, and the very word "equitable" demands that the
9 Court, you know, apply a fair -- make a fair decision based on
10 the facts. And I have to tell you that there was that
11 seven-year delay that Petter didn't take any activity, but I
12 don't see how, considering the fact that Hydro says, well,
13 it's been making these products since 1980, how Hydro was at
14 all adversely affected by this seven years of silence. I'm
15 going to get some water here. Maybe you could respond to
16 that.

17 MR. FOSTER: You're ready for me to do that now?

18 THE COURT: Sure.

19 MR. FOSTER: Okay.

20 THE COURT: Then I'm going to give Mr. Rath a chance
21 to get right up there and say that's wrong.

22 MR. FOSTER: Your Honor, I think you've focused on
23 an important point, and I completely agree with the concept
24 that this is equitable. It's not going to be a jury issue;
25 it's going to be your issue.

1 In regard to the prejudice, I think what you have is
2 you have the ten letters that went back and forth, a few in
3 1998, more in 2000 going back and forth. You have a drop-dead
4 deadline of October 1. Both sides understood and Mr. Petter
5 testified that he would have thought that Hydro should expect
6 a lawsuit, and Hydro said we expected a lawsuit if we didn't
7 satisfy them.

8 THE COURT: But it didn't do anything. I mean, it
9 went ahead and got its own patents.

10 MR. FOSTER: What it did --

11 THE COURT: And it kept manufacturing the product.
12 I mean, you know --

13 MR. FOSTER: That's exactly right, Your Honor.
14 That's exactly right. They kept doing what they were doing
15 that they accused them of infringement with respect to.
16 That's the issue.

17 When you have back in 2000 allegations in the
18 letters from Mr. Rath saying, Your Hydropad products look like
19 they're similar to ours, insinuate infringement, offer a
20 license, we don't say, We have any interest in a license. We
21 say, We don't think we have to stop doing anything. We're
22 doing the same thing we've been doing for a long time. Should
23 we stop? Now we get to the point we get a lawsuit filed and
24 there's been increase of employees, there's been increase in
25 profits, there's been capital investments, all toward

1 continuing to do what we've been doing.

2 Now, I think to try to mitigate a little bit against
3 the current of our equitable estoppel argument, they've more
4 narrowly tailored their arguments of infringement today as we
5 sit here, as we'll discuss later.

6 THE COURT: Oh, really?

7 MR. FOSTER: And so that's the issue. So you start
8 with Hydropads. Hydropads is the universe of pads they make.
9 We go forward, we move forward, we have capital investment, we
10 substantially increase the size of our employees, we work
11 forward, and I believe that the case law talks about in terms
12 of reliance it's sufficient if they lull you into a feeling
13 that you're not going to be sued and you can continue on with
14 business as usual. That's what we did.

15 THE COURT: Well, where did they threaten to sue
16 you? I mean, they asked you to stop. I went through the
17 letters, and maybe my notes aren't as thorough as they should
18 be, but the last letter I have before -- well, before you got
19 your patent '591 in 2004 is -- and quite frankly, these are
20 handwritten notes that are quite cryptic -- 9/6/2000, Petter
21 to Hydro, wants more detailed information regarding sales
22 prior to 9/97, and then Hydro responds, no material change.
23 That's it.

24 MR. FOSTER: Your Honor --

25 THE COURT: That's not a threat of a lawsuit or

1 anything.

2 MR. FOSTER: Well, I guess what you have to look at,
3 first of all, the first letter that came out says we've spent
4 a lot of money. This is Exhibit 1 to --

5 THE COURT: Yeah, but that was even before they got
6 a patent.

7 MR. FOSTER: Certainly.

8 THE COURT: My notes on that say Petter warns Hydro
9 that it appeared that Hydro's system would violate several
10 claims in a pending patent application, will pursue whatever
11 means are available. Is that what you're talking about?

12 MR. FOSTER: Yes, okay. And the testimony of Mr.
13 Petter that we've cited to indicates that that meant -- "all
14 means necessary" meant when the patent issued, taking them to
15 court, and that was his testimony. That was his
16 understanding. That was our understanding. So you have the
17 testimony of our guys saying, We thought that meant when the
18 patent issued, they were going to sue, and their guy
19 testifies, We meant that we were going to sue. That was part
20 of the "all means necessary." So you've got undisputed facts
21 supporting that.

22 Now, I think that's just the starting point, and
23 that gives the frame of reference to both parties that a suit
24 may be coming. The patent issues, there's exchanges of
25 letters, and then we get down to the October 1 --

1 THE COURT: Did they ever threaten a lawsuit once
2 they got the patent? I mean, they couldn't sue you when they
3 sent that letter on 5/15/98. Then the patent issues. They
4 never threatened to sue you after that.

5 MR. FOSTER: Well, you get to the final letter, Your
6 Honor, which was before -- this is the last letter. This is
7 in October of 2000.

8 THE COURT: All right. Let me -- October, okay.

9 MR. FOSTER: And it basically has a drop-dead
10 deadline of October 1. Give us more answers to our questions
11 by October 1, 2000.

12 And what's the testimony of Mr. Petter about that?
13 He said -- this is in Exhibit L to our papers. He says: "You
14 previously informed Hydro that you'd take any means necessary
15 to enforce your intellectual property rights, correct?"

16 Answer: "Correct." "Would it fair to assume if you're
17 sitting in Hydro Engineering's standpoint that if they don't
18 provide something, they may well get sued? That would be a
19 fair understanding, wouldn't it?" And this is concerning the
20 October 1 deadline. Answer: "I would be concerned if I were
21 them, yes." Question: "Concerned about getting sued?"

22 Answer: "Yes."

23 That's the testimony of their witness in respect to
24 the October 1 deadline. It's exactly what they intended to
25 convey. That's exactly the way it was taken. The witnesses

1 on both sides of the case testified they expected that Hydro
2 would be sued if we didn't do what we needed to to solve the
3 issue.

4 THE COURT: All right.

5 MR. FOSTER: We responded, and they do nothing for
6 seven years. So with all respect, Your Honor, while they
7 don't in the letter expressly say we're going to sue you, the
8 import of what they did according to the testimony of
9 witnesses on both sides is initially when he said whatever
10 means necessary, that intended to convey the idea that they
11 may be going to court.

12 THE COURT: Maybe, yeah.

13 MR. FOSTER: And the October 1 deadline clearly, he
14 says, I'd be concerned about getting sued if I were you. Our
15 guys said, We were concerned about getting sued. When both
16 sides agree to the interpretation of that and both sides
17 understand that there's going to be a lawsuit, I don't think
18 there's a question of fact that prevents you from concluding
19 that they threatened a lawsuit; and when they didn't go
20 forward with it and Hydro continued to move forward with
21 business as usual, that you have the situation that equitable
22 estoppel -- for which equitable estoppel should afford relief.

23 THE COURT: All right. Thank you.

24 Mr. Rath?

25 MR. RATH: A few thoughts in responding to what Mr.

1 Foster said and then I'd be happy to answer any questions you
2 have for me, Your Honor.

3 You know, Hydro's coming in here asking for
4 extraordinary relief, okay, and I think you've hit the nail
5 right on the head here. You know, they have to prove three
6 things. They have to prove that there was some misleading
7 communication and that that had to happen after the patent
8 issued, okay.

9 None of the letters that I sent to them threatened
10 litigation in any way. In fact, the first letter I sent said
11 we're willing to entertain the possibility of granting you a
12 license and we'd like to resolve this in an amicable manner,
13 and it never changed, including the September letter that I
14 sent. What happened there was the Petters were getting tired
15 of feeling like they were getting run around. We kept asking
16 for information, asking for information. Well, it's been
17 destroyed. We don't have that.

18 And so these deadlines -- or the one deadline that
19 was implemented was simply to keep the thing going so the
20 Petters could decide how they were going to proceed, and at
21 that time they made a business decision that, you know, we're
22 not getting anywhere with this. Why spend money on all these
23 letters and time and energy? Let's just go on and do our
24 business.

25 The other thing you touched on, Your Honor, was how

1 was Hydro adversely affected? Nothing has been quantified
2 here or even attempted to be quantified. They say, Well, you
3 know, we went ahead and did business as usual and we had a
4 loss and relied on your statements. Well, what loss was it?
5 Where is the potential increase in damages? Where is the loss
6 in their business or anything else that they got as a result
7 of this so-called reliance on the misleading conduct that they
8 claim happened? There is none. They've provided nothing, no
9 specific evidence to show, Hey, we lost a million bucks.
10 We're looking at a million dollars in damages. There's
11 nothing like that.

12 They also claim there's been a loss in evidence.
13 Well, what evidence? Okay, apparently Mr. McCormick can
14 remember that he received a letter in 1998 even though Mr.
15 Petter doesn't remember sending it, but somehow the --

16 THE COURT: Yeah, that's the letter that maybe came
17 out of discovery as distinguished from out of their -- from
18 you instead of them?

19 MR. RATH: Correct, correct. That letter did not
20 come out of their files at all. And he has the memory back to
21 1998 that he received that letter, but yet there's somehow a
22 loss of memory about some other thing that we don't even know
23 about. Again, there's nothing specific pointed to that, Hey,
24 we lost this evidence, and therefore, we're adversely affected
25 by it.

1 The last thing I want to touch on, Your Honor, is
2 that 1998 letter. You are correct that Petters did not have a
3 patent at that time. When you go through the patent
4 application process, you don't know what the scope of the
5 patent's going to be until it issues, and so there's no way of
6 knowing really until it issues about whether their product
7 would be covered by the claims of that patent or not. It was
8 merely to put Hydro on notice. Hey, we got a patent
9 application on file. You should beware.

10 THE COURT: All right.

11 Thirty seconds?

12 MR. FOSTER: May I, just very quickly?

13 In regard to prejudice, among other things, even in
14 respect to the configurations they assert that are infringing
15 today, they claim that there are two installations that are
16 infringing. Had we known what their position is, had they
17 sued and had they narrowed their position, then we would not
18 be here today because we would have configured the systems
19 differently, and we wouldn't have sales in 2005 and 2007 that
20 infringe. That's prejudice.

21 THE COURT: Well, of course, at this point in time I
22 take all the facts in the light most favorable to the party
23 opposing the motion, and that happens to be Petter. And I
24 think that there are sufficient facts here that I'm not going
25 to grant the motion, and I'll go through a more thorough

1 analysis in a minute.

2 But just keep in mind the standard that we have for
3 summary judgment. I mean, you've made the motion. I'm not
4 going to grant summary judgment for either side, but as I
5 said, the facts must be construed in the light most favorable
6 to the plaintiff, then the counter-defendant, Petter, at this
7 point in time. All right.

8 MR. FOSTER: Fair enough. I had a couple other
9 points that I'd be happy to make very quickly, but if you've
10 already made that decision, then we'll move on.

11 THE COURT: Yeah, okay. And let me give you the
12 grounds for it. Bear with me as I try to do this.

13 A patentee is equitably estopped to assert
14 infringement of its patent if: one, it misleads the alleged
15 infringer through conduct, such as words, action, inaction, or
16 silence when it had a duty to speak, to reasonably infer that
17 the patentee does not intend to enforce its patent against the
18 alleged infringer, and that's the prime test we're talking
19 about; the alleged infringer relies on that conduct; and the
20 alleged infringer will be prejudiced by its reliance if the
21 patentee is allowed to proceed with its claim. That's Scholle
22 Corporation against Blackhawk Molding Company, Inc., 133 F.3d
23 1469, 1471, Federal Circuit, 1998.

24 Petter warned Hydro in May 1998 that it would
25 infringe its pending '792 patent, and informed Hydro that

1 Petter had forwarded the matter to its attorney and would,
2 quote, "pursue whatever means were available," end quote, to
3 protect its intellectual property. Petter wrote Hydro again a
4 couple of months after it received the '792 patent in February
5 2000. That letter suggested that Hydro was infringing the
6 '792 patent, stated that Petter preferred an amicable
7 resolution, and raised the possibility of granting Hydro a
8 license. The parties exchanged information about their
9 products for several months. On September 6, 2000, Petter
10 requested Hydro to provide more information about its product
11 line by October 1, 2000, and communications ceased shortly
12 thereafter.

13 Hydro contends that Petter threatened immediate
14 litigation and subsequently lulled Hydro into believing it had
15 abandoned its claim through seven years of silence. While
16 threatening conduct followed by silence may establish
17 estoppel, silence will not suffice, quote, "unless there was a
18 clear duty to speak or the patentee's continued silence
19 reenforces the defendant's inference from the plaintiff's
20 known acquiescence that the defendant will be unmolested.
21 Furthermore, this inference must be the only possible" one to
22 merit summary judgment. That's A.C. Aukerman Company v. R.L.
23 Chaides Construction Co., 960 F.2d 1020, 1043-44, Federal
24 Circuit, 1992.

25 To demonstrate reliance, the parties must have had,

1 quote, "a relationship or communication that lulls the
2 infringer into a sense of security," end quote. That's
3 Aukerman at 1043. Petter made no affirmative representation
4 that it had abandoned any claim against it, nor did it remain
5 silent when it had a duty to speak. Hydro's reliance on
6 Petter's silence, then, does not rise to the point where
7 summary judgment should be granted, and it's a good question
8 whether it was reasonable if there was reliance.

9 In Aukerman, the Federal Circuit held that the
10 plaintiff's nine years' silence after setting a deadline for
11 the defendant to take a license created a reasonable inference
12 that the defendant could use the invention unmolested. In
13 that case, the defendant had informed the plaintiff that
14 another party was responsible for any infringement.

15 In Scholle, the plaintiff was engaged in a number of
16 lawsuits against alleged infringers. I think you have that
17 cite. If you don't, I'll give it to you. The defendant
18 informed the plaintiff it had developed a product it believed
19 did not infringe the plaintiff's patent and that it would
20 market the product unless the plaintiff informed the defendant
21 that it believed defendant's product infringed. That's
22 Scholle, 133 F.3d at 1472. The court held that this course
23 of conduct established the plaintiff's duty to speak and that
24 the defendant reasonably inferred from the plaintiff's silence
25 that it would not be sued. Same cite.

1 The affirmative conduct that led the defendants in
2 the aforementioned cases to conclude from the patentees'
3 silence that they were abandoning any claims against them is
4 not present here. Hydro did not inform Petter that it would
5 proceed unless Petter determined Hydro had infringed Petter's
6 patent, and there was no suggestion that Petter regarded
7 someone else liable for the alleged infringement.

8 The Federal Circuit has held that silence following
9 an attempt to negotiate a license was insufficient. That's
10 Meyers against Asics Corp., 974 F.2d 1304, 1308-09, Federal
11 Circuit, 1992. Although the delay was longer here, the facts
12 are somewhat similar to those in Meyers. And let me emphasize
13 once again that these are equitable matters and one judge's
14 sense of fairness sometimes is different from another judge's
15 sense of fairness, but we still are guided to a large extent
16 by precedent from the Court of Appeals, and maybe sometimes
17 even from other district judges and sometimes even from
18 ourselves. We don't even have to follow our own decisions, by
19 the way.

20 Hydro did ask Petter whether it was correct in its
21 belief that it could continue operating if its activities long
22 predated the '792 patent. However, the evidence suggests that
23 Petter continued to request information because it had not
24 determined that Hydro was correct. Petter never suggested it
25 believed that question had been resolved in Hydro's favor.

1 Hydro's assertion that Petter threatened an imminent
2 lawsuit is unpersuasive. Although Petter stated it would
3 pursue whatever means were available to protect its interest,
4 Hydro knew at the time that Petter's patent was merely
5 pending. A suit for infringement was not possible at that
6 time. When the parties renewed communication after the '792
7 patent was issued, Petter did not threaten suit, but it
8 instead explained that it preferred an amicable solution.

9 Although the Federal Circuit held that threatened
10 litigation was not a prerequisite to estoppel by silence in
11 ABB Robotics against GMFanuc Robotics Corp., 52 F.3d 1062,
12 Federal Circuit, 1995, the parties in ABB Robotics had a more
13 extensive relationship than Petter and Hydro. GMFanuc's
14 parent company was the plaintiff's largest customer. GMFanuc
15 knew the plaintiff was not actively marketing the subject
16 matter of the patent, and furthermore, the parties continued
17 negotiating other licensing arrangements and the plaintiff
18 licensed other patents to the defendant.

19 Hydro and Petter do not have the extensive
20 relationship that justified equitable estoppel in ABB
21 Robotics. In fact, they happen to be competitors and not any
22 business relationships with each other, other perhaps than
23 this lawsuit and perhaps some competition in trying to sell
24 their respective car wash systems.

25 Hydro has not provided sufficient evidence that it

1 relied on its belief that Petter had abandoned any claim
2 against it. Hydro contends it invested substantial capital to
3 expand its operations, significantly increasing sales and
4 profits from its Hydropad products. However, when initially
5 warned of potential infringement in 1998, Hydro replied that
6 it had been selling wash pads since 1980 and asserted that the
7 '792 patent would be unenforceable against Hydro because its
8 allegedly infringing activities long predated Petter's patent
9 application.

10 This evidence suggests that Hydro would have
11 continued its capital investment even if it believed Petter
12 would continue to pursue its claim. Hydro had been conducting
13 business in this field for years. There is no indication it
14 suspended operations when it was contacted by Petter only to
15 resume them after a time because it believed Petter had
16 relinquished its claim. It appears that Hydro merely
17 continued along a course it had charted years before receiving
18 any of these letters. At the least, whether Hydro relied on
19 its belief in expanding its business operations is a genuine
20 issue of material fact which you can look at again later, but
21 at this point in time I don't think that there's been any
22 clear showing for summary judgment, and that's the reason for
23 the ruling that I announced earlier.

24 So there we are on that, which brings us then to the
25 claim construction of the '792 patent. On that, I think the

1 critical term is "vacuum pump," but I'm delighted to hear that
2 the parties have narrowed the issues somewhat.

3 Where are we? What is this narrowing you're talking
4 about, Mr. Foster, if it's true? And I'm not saying, you
5 know, that you would mislead. I'm just saying --

6 MR. FOSTER: I think that we're talking about the
7 Hydropads that are accused of infringement. When Mr. Rath
8 wrote letters back in 2000, he said, We think your Hydropad
9 product may be similar to our product and may infringe, and so
10 that's really what Mr. Miller was prepared to talk about.

11 THE COURT: I see, okay.

12 MR. FOSTER: From our perspective we completely
13 agree that "vacuum pump" is the key limitation, and frankly,
14 we believe it should be dispositive. While we raised three
15 other elements, we think the vacuum pump should be the
16 beginning and end of things.

17 THE COURT: Okay. Just stand right there if you
18 would. Mr. Rath, why don't you stand next to him so that I
19 can zero in on this here, and it might go back and forth.

20 Do you agree with him, Mr. Rath, that the claim
21 construction of "vacuum pump" might be dispositive?

22 MR. RATH: I think it --

23 THE COURT: If I buy his construction, that the case
24 is over with, because then if I buy his construction, then I
25 go on to summary judgment. Assuming that I buy his

1 construction of the claim, and I've got the claim written out
2 here somewhere, do you agree then that at least you're in big
3 trouble on summary judgment?

4 MR. RATH: I am a patent attorney and I hate to
5 concede anything, but this time I will because I do think it
6 is dispositive if Hydro gets the construction it wants because
7 I don't think there's an equivalence argument here, and so I
8 really think that the infringement issue would be decided.

9 THE COURT: And let me, you can -- let me tell you I
10 have real trouble with your argued construction. First of
11 all, I don't know the difference -- you talk about your
12 proposed construction uses the word "suck", which to me
13 implies some kind of a vacuum at some point in time. I mean,
14 all pumps based on my one year of physics in high school and
15 one year in college, basic stuff, all pumps suck a little
16 bit. I mean, a piston pump sucks. A rotary pump sucks. They
17 all suck as these chambers open and close.

18 But a vacuum pump sucks differently, doesn't it?
19 Because the piston pump as I understand it operates directly
20 on the water while the vacuum pump operates on air, and then
21 there's a sucking, but there's more than that. It doesn't
22 operate directly on the water.

23 So I have a -- and then you have that, you know,
24 where you try to distinguish the Carter -- I could through all
25 this bit by bit, but I'll give you a chance to respond to all

1 this. Then you have your distinction of the Carter patent,
2 and it looks to me like that distinction, that long paragraph
3 says exactly what Mr. Foster wants me to say. This is your
4 big opportunity.

5 MR. RATH: I think in that paragraph we definitely
6 limited it, okay. And if I can back up a little bit, "vacuum
7 pump" is --

8 THE COURT: But you say you limited it only to the
9 placement. I don't read that at all. You also limited it --
10 you limited it to the placement and you limited it to the
11 operation. That's the way I read it.

12 MR. RATH: I agree with you that we limited it to
13 the operation, but I don't agree that it goes as far as Mr.
14 Foster wants it to go to, and that's where we disagree, okay.
15 And I think the operation and placement go hand-in-hand,
16 okay. But really what I believe that the construction should
17 be is that you need to pull water, it's a pump that pulls
18 water through the tube, okay, from the drainage fitting to the
19 filtering system, and that's the end of the story.

20 THE COURT: Well, okay. Tell me how their pump does
21 that. You say pull. Do you say push, Mr. Foster?

22 MR. FOSTER: That's correct.

23 THE COURT: Yeah. He says push.

24 MR. FOSTER: That's absolutely right, correct.

25 THE COURT: Okay. Tell me how it's pulled, and tell

1 me how it's pulled with a sucking.

2 MR. RATH: Okay. We provided you a video, I
3 believe, and a declaration from Mr. Doug Petter that showed
4 just how that pump sucks water from a trough over to the pump
5 box. And what happens is, I don't want to get into too much
6 detail, but basically we're talking about pressure
7 differentials. Vacuum and where we're talking about gravity
8 or sucking, really we're talking about pressure on this side
9 where the trough is, okay, and where there's a head of water
10 plus atmospheric pressure, gravity, and a pressure on this
11 side. Well, what happens is gravity will cause or atmospheric
12 pressure will cause that water to flow.

13 THE COURT: Of course.

14 MR. RATH: Okay. But once you put the pump in that
15 Hydro's using, it flows faster. It's creating that suction.

16 THE COURT: Of course. Of course.

17 MR. RATH: Okay. So it's not a pushing; it's
18 pulling. It's pulling that water.

19 THE COURT: But it's not a vacuum pump. In other
20 words, it's operating by gravity, not by the sucking of air
21 out of a chamber, and that's the point that you have with a
22 vacuum pump.

23 For example, you've got two chambers and they're
24 ten-gallon chambers. They're side by side with a pipe between
25 them. You put five gallons into the one on the right. You

1 put six gallons to the one on the left. What happens? They
2 move. They're each five and a half.

3 MR. RATH: That's correct.

4 THE COURT: They're each five and a half gallons.
5 All right. Is that what -- that's what you're talking about
6 basically, but they're not talking about that. They're saying
7 it's a vacuum pump. You've got ten gallons. You've got five
8 gallons on one side, you've got five gallons on the other
9 side, and you suck the air out of the one on the right. What
10 happens? The water flows. And if you put a spigot on it, the
11 water would flow also. You get down to four gallons.

12 That's totally different from an ordinary pump
13 that -- what you're talking about is speeding up the flow of
14 water. The pump is speeding up the flow of water. That means
15 of course that the water in the pump on the left is going to
16 flow into the pump on -- into the chamber on the right.

17 MR. RATH: This is --

18 THE COURT: I don't get your argument. In other
19 words, you're not -- you use the word "vacuum pump." All
20 right. The difference between drinking a Coca-Cola from a
21 glass and through a straw, I guess. But the water is going
22 to -- you pump the water out of the receiving chamber, of
23 course the water's going to flow out. But that's not anything
24 close to a vacuum, and it's not anything close to the
25 excavation of gas from a chamber. What it is is simple

1 gravity, like you yourself said.

2 MR. RATH: It's not just simple gravity, though,
3 Your Honor. It's creating a higher pressure differential
4 between the two sides. Their pump and our what we call the
5 vacuum pump, okay, it's working the same way.

6 THE COURT: How does it create different pressure?

7 MR. RATH: It creates a lower pressure, relative
8 pressure in the pump box by removing water and causing -- and
9 pulling air into it to move the water.

10 THE COURT: Well, that's not anything close to a
11 vacuum as you yourself say, but that's simple hydraulics.
12 That's got nothing to do with the pump. It's got nothing to
13 do with the vacuum pump. It's -- anyway, Mr. Foster, where am
14 I wrong here?

15 MR. FOSTER: I can't -- you're right on. I did want
16 to point out one thing if I could. I brought Mr. Miller to do
17 one thing. Maybe he can hold this up for me.

18 THE COURT: Go ahead. Have you shown this to Mr.
19 Rath first?

20 MR. FOSTER: Yeah. This is just a figure.

21 THE COURT: Have you shown this to Mr. Rath?

22 MR. RATH: Well, I've seen this. This is from the
23 brief.

24 MR. FOSTER: It's from our brief. I want you to
25 hold this one up, Mark, I think.

1 What I want to tell you is you are absolutely
2 right. A vacuum is going to pull it by air, the sucking of
3 the straw. What they did to get around Carter -- and this is
4 Carter, okay. You've got the tub where they're going to put
5 the water in there. You have pipe 112, it's a pipe, and then
6 you have the pump, and then you have the filters.

7 THE COURT: Stick right there, Mr. Rath. You'll get
8 a chance with them. You get to use their chart too.

9 MR. FOSTER: Not a problem.

10 So what they did is they said -- they didn't say
11 anything about the relative pressures or how fast fluid flows
12 from one tub to the next. They said, We don't have this kind
13 of a pump. We have a pump -- we don't have that. We have our
14 pump right here and it's a vacuum pump, and we take with that
15 air that you're talking about, we pull it through the filters
16 with the vacuum pump.

17 THE COURT: Right.

18 MR. FOSTER: We don't push it through the filters,
19 and therefore, they said there are two whys. Why is that
20 important? This is what they told the Patent Office to get
21 their patent. They said because this pump, being an in-line
22 pump, is going to have the junk coming here, it's going to,
23 you know, stop the impellers. It will get clogged with
24 debris, okay. If you vacuum it through the filters first,
25 there's no debris. And this is important. This is really

1 hitting his issue.

2 THE COURT: The same like you have in a heart pump,
3 by the way.

4 MR. FOSTER: They said --

5 THE COURT: Well, that's the reason they have a
6 vacuum -- you know, that's why they have the filters in a
7 heart pump. But anyway, go ahead.

8 MR. FOSTER: Yeah. And then they said the second
9 thing is this kind of a pump is big and you have to have -- in
10 order for the fluid to drain from here to the sump, you have
11 to have either the wash pad higher or you have to create a box
12 for it to flow into. They were talking about the exact kind
13 of flow that he wants to argue now is some kind of a vacuum
14 pump, but at the end of the day they said, We pull it through
15 with a vacuum pump, and commercial manufacturers of vacuum
16 pumps thought this was not going to work. They were
17 surprised. An in-line pump that they want to call a vacuum
18 pump today, everybody knew about. It's well-established in
19 the prior art, including in Carter. And there's just -- when
20 you disclaim as they did here, you can't recapture it when
21 somebody has the same kind of a pump that Carter did in-line
22 with impellers that pushes the water through their filter. It
23 doesn't draw through, so I think you're dead on, Judge.

24 THE COURT: Hold it up for Mr. Rath.

25 MR. MILLER: I'm happy to hold it for Mr. Rath as

1 well.

2 MR. RATH: Well, sure you are based on what the
3 Judge said, but I want to reiterate the point we were making
4 to the Patent Office was both the placement and how it works.
5 How it works is it pulls water through this tube from the pad
6 to the filtering system, and that was the intention of this
7 what we call the vacuum pump.

8 You know, at the end of the day a vacuum pump
9 typically, like you said, removes air. It was probably the
10 wrong terminology, but the way we tried to define it to the
11 Patent Office was simply that was to move that water through
12 the tube from the pad to the filters. And I would concede we
13 did distinguish a pump that was right here at this pad, okay.
14 There's no denying that. But the idea was that this pump was
15 to move this water to the filtration system through a tube.

16 THE COURT: All right.

17 MR. FOSTER: I just have one more thing to add,
18 Judge, just because I can't help myself. Hockerson v.
19 Halverson, this is -- Halberstadt, 222 F.3d 951, they made the
20 same argument. Gee, that was the wrong terminology. That
21 must have been a mistake the way we called it a vacuum pump.

22 THE COURT: Well, they called it that way more than
23 once. I mean --

24 MR. FOSTER: This is what the Federal Circuit said:
25 "Their argument therefore reduces to a request for a mulligan

1 that would erase from the prosecution history the inventor's
2 disavowal of a particular aspect of a claim term's meaning.
3 Such an argument is inimical to the public notice function
4 provided by the prosecution history. The prosecution history
5 constitutes the public record of a patentee's representations
6 concerning the scope and meaning of the claims, and
7 competitors are entitled to rely on those representations
8 when ascertaining the degree of lawful conduct, such as
9 designing around the claimed invention."

10 THE COURT: Well, final words, Mr. Rath?

11 MR. RATH: I don't disagree with the law, obviously,
12 but I don't -- I've agreed, I believe, that there's been a
13 disclaimer here. But I think what we did was define it, and
14 we have a difference of opinion on how that term was defined.

15 THE COURT: Yeah. Well, okay. You're going to have
16 to find out if I can read my own handwriting here to a certain
17 extent, I think.

18 Well, the disputed term is "vacuum pump for pumping
19 a liquid through said tube from said drainage fitting to the
20 filtering system." Hydro would say: "Vacuum to draw water
21 from the fitting and through the filters rather than a pump to
22 push the water through the filters." Petter says: "A pump
23 located outside of the trough which utilizes suction to vacuum
24 up wastewater from the washing process."

25 Well, in support of its arguments Petter emphasizes

1 the language of the claim itself: "vacuum pump." It's not a
2 magic term of any kind. Hydro also notes that the single
3 preferred embodiment described in the specification states
4 that the "filtering system generally includes two vacuum pumps
5 and a tank. Vacuum pumps suck the liquid through the hose
6 from the drainage fittings on the various wash racks to the
7 filtering system." Hydro contends that the specification
8 requires a vacuum pump inside the filtering system to apply
9 negative pressure to suck the water from the drainage
10 fittings, through the hose, and into the filtering system.

11 Hydro also relies on the prosecution history. The
12 examiner originally rejected claim 1 on the grounds that it
13 conflicted with the prior art, the Carter patent that we were
14 just talking about. And Petter distinguished the Carter
15 patent by noting that, quote: "utilizing a vacuum to draw the
16 water from the fitting and draw the water through the filters
17 rather than utilizing a pump located directly at the fitting
18 for pushing the water through filters and the heater to the
19 pressure washer is much more advantageous, since the water
20 passes through all the stages of filters prior to reaching the
21 vacuum. In the Carter patent pump 104 would be subject to
22 continuous jamming of the impellers by debris rinsed off the
23 object being washed. Furthermore, pumps, such as the pump 104
24 utilized in Carter, take up a considerable amount of space and
25 require that the water flowing from the wash rack flow

1 downward into the pump. Such an arrangement would require the
2 wash rack to either be elevated sufficiently or would require
3 that the pump be provided in a well formed under or adjacent
4 the wash rack. Thus, the use of a vacuum provides several
5 advantages not offered by the pump used in the Carter patent."

6 Hydro contends that Petter cannot construe its
7 claims, quote, "one way in order to obtain their allowance and
8 in a different way against accused infringers," end quote.
9 Computer Docking Station Corp. against Dell, Inc., 519 F.3d
10 1366 at 1375, Federal Circuit, 2008, quoting another case.

11 Petter emphasizes its argument that the
12 specification describes a vacuum pump which "pumps a liquid
13 through the tube from the drainage fitting to the filtering
14 system," and notes that it states, quote, "vacuum pumps 70
15 suck the liquid through the hose 20 from the drainage fittings
16 34 to the various wash racks 12 to the filtering system 14."
17 Petter argues that during prosecution it distinguished, quote,
18 "a pump which utilized a vacuum to draw water from the
19 drainage fitting from a pump that was located directly at the
20 drainage fitting," end quote. This limitation, it contends,
21 requires only that the pump be placed anywhere besides the
22 trough or the drainage fitting.

23 As we've already discussed, the proffered
24 constructions contain two fundamental differences: the
25 location of the vacuum pump and the manner in which it acts

1 upon the liquid. "Pumping," taken alone, could compromise
2 propulsion of a fluid through either positive or negative
3 pressure. The fluid in question might enter the pump's intake
4 and be expelled more rapidly from its exhaust. A pump might
5 also be used to evacuate a gas-filled chamber, using the
6 greater atmospheric pressure outside the chamber to draw the
7 fluid in question into the chamber.

8 Under its ordinary meaning, a "vacuum pump" is
9 understood by mechanical engineers to be, quote, "a compressor
10 for exhausting air and noncondensable gases from a space that
11 is to be maintained at subatmospheric pressure," end quote.
12 That's McGraw-Hill Dictionary of Scientific and Technical
13 Terms (Mark Licker, publisher, Sixth Edition, 2003).

14 The Court must construe the disputed language by
15 relying primarily upon intrinsic evidence. That's the
16 Phillips case which even I am becoming familiar with at this
17 stage in my life, 415 F.3d at 1321, 1324. Though the Court
18 carries with it this general understanding of a vacuum pump,
19 the construction of the term is not bound by this
20 understanding. Instead, it will be molded by the use and
21 context of the language of the claims, specifications, and
22 prosecution history.

23 The first question, therefore, is whether Petter
24 intended "vacuum pump," end quote and quote, to be understood
25 according to its ordinary meaning within the art, or whether

1 it intended "vacuum pump" to encompass both devices that pump
2 the liquid by acting directly upon the liquid as well as those
3 that pump the liquid indirectly by evacuating a gas-filled
4 chamber and relying on the greater atmospheric pressure to
5 draw the liquid into the chamber. In other words, did Petter
6 intend that "vacuum pump" actually include a broader class of
7 pumps than indicated by the ordinary meaning of "vacuum pump"
8 within the art?

9 The claim itself states only that the vacuum pump
10 pumps the liquid. No other language in the claim reveals
11 whether the pump does so through indirect or direct action
12 upon the liquid. The specification describes a single
13 preferred embodiment of the invention. That embodiment
14 contains a, quote, "filtering system generally including two
15 vacuum pumps and a tank," end quote. These, quote, "vacuum
16 pumps suck the liquid into the tank 72," end quote. "Suck"
17 has many definitions. However, the only one applicable in
18 this context is "to draw water, air, et cetera, in some
19 direction, especially by producing a vacuum." That's Oxford
20 English Dictionary, Second Edition, 1989. This definition
21 strongly suggests the creation of a vacuum, but it does not
22 require that.

23 The specification warns that, quote, "draining
24 fitting 34 should have a properly sized hole to ensure the
25 greatest efficiency. If the hole has too large of a diameter,

1 the vacuum pumps pull on too much air, which is undesirable.
2 If the hole has too small of a diameter, too low of a velocity
3 of the liquid will result." When the drainage fitting is not
4 filled with liquid, air enters the hose through the hole in
5 the drainage fitting. That larger volumes of air entering the
6 hose reduces the flow rate of the liquid indicates that the
7 vacuum pumps remove air from the tank into which the liquid is
8 pumped. The liquid is pushed into the hose toward the tank by
9 the difference in atmospheric pressure and the air pressure
10 inside the tank. Air entering the tank through the hose via
11 the hole in the drainage fitting weakens the vacuum inside the
12 tank, diminishing the pressure differential on which the
13 pumping mechanism relies. However, too small a hole restricts
14 the flow of liquid.

15 The preferred embodiment describes only a pump that
16 evacuates a chamber and uses the air pressure differential to
17 pump the water into the filter system. The Federal Circuit
18 has made clear, however, that "absent a clear disclaimer in
19 the description of the preferred embodiment, the fact that the
20 inventor anticipated that the invention may be used in a
21 particular manner does not limit the scope to that narrow
22 context," end quote. That's Brookhill-Wilk 1, 334 F.3d at
23 1301. The admonition of this case prevents the Court from
24 narrowing the ordinary meaning of a claim term where, quote,
25 "the written description and prosecution history fail to

1 express a manifest exclusion or restriction limiting the claim
2 term, and where the written description otherwise supports the
3 broader interpretation," end quote. In this case, Petter asks
4 the Court to ignore the limitation on, quote, "pump," end
5 quote, imposed by the modifier "vacuum" in the claim itself,
6 even though the specification provides ample evidence that
7 Petter intended the limitation contained in the claims, and
8 provides no evidence that "vacuum pump" was intended to be
9 read more broadly than its ordinary meaning within the art.

10 The prosecution history further belies an expanded
11 interpretation of the phrase. Petter argues that during
12 prosecution it distinguished the pump claimed in the Carter
13 patent only with respect to its location; i.e. that the Carter
14 pump was located at the trough and the claimed Petter vacuum
15 pump was not. However, as Hydro points out, Petter's request
16 for amendment distinguished the pump in the Carter patent on
17 additional grounds and with greater specificity than Petter
18 now argues. Petter argued before the examiner that Carter did
19 not teach or suggest a "vacuum pump for drawing water from the
20 drainage fitting to a filtering system." This statement does
21 not refer to the pump's location at all. Instead, it
22 contrasts its operation with the Carter's pump.

23 Petter further distinguished a "vacuum to draw the
24 water from the fitting and draw the water through the filters"
25 from a "pump located directly at the fitting for pushing the

1 water through the filters." In neither statement did Petter
2 specify the vacuum pump's location. In both, Petter
3 highlighted the "vacuum" action of its pump, which "draws" the
4 water to the filtering system -- and both of those should be
5 in quotes, "vacuum" and "draws," by the way -- to the
6 filtering system and contrasted it with the action of the
7 Carter pump. Petter now contends, however, that it merely
8 distinguished the pump's location without limiting the nature
9 of its action. And I disagree with that, as I've said, for
10 the reasons stated.

11 The contention is not only inconsistent with
12 Petter's argument in its request for amendment, it is also
13 undermined by Petter's explanation to the examiner of the
14 advantages of its vacuum pump over the pump claimed in the
15 Carter patent as was just pointed out in my judgment by
16 Hydro. Petter noted that, quote, "utilizing a vacuum to draw
17 the water from the fitting is much more advantageous," end
18 quote, than, quote, "utilizing a pump located directly at the
19 fitting for pushing water through filters since the water
20 (drawn by a vacuum) passes through all the stages of filters
21 prior to reaching the vacuum. The Carter pump would be
22 subjected to continuous jamming of the impellers by debris,"
23 end quote. This advantage, by which Petter distinguishes the
24 Carter patent, requires a vacuum pump which acts indirectly
25 upon the liquid. Using a pump which acts directly upon the

1 liquid, as the Carter pump does, requires the liquid pass
2 through the pump before it reaches the filter.

3 Petter also noted in its request for amendment that
4 the Carter pump "requires that the water flowing from the wash
5 rack flow downward into the pump. The wash rack must be
6 elevated sufficiently or the pump must be in a well formed
7 under or adjacent the wash rack." Of course, I've read all
8 this before, but anyway, the gravamen of Petter's argument
9 before the examiner was that the liquid must flow downhill via
10 the gravitational force to reach a pump acting directly upon
11 the liquid. Furthermore, to pump the liquid to the filter,
12 the liquid must be accelerated by the pump before it reaches
13 the filter. Using a pump which acts directly upon the liquid
14 requires the liquid flow through the pump prior to reaching
15 the filters. Petter argued to the examiner that its use of a
16 vacuum pump to draw the liquid to the filter solved the
17 shortcoming of the Carter patent.

18 Quote: "A patentee may limit the meaning of a claim
19 term by making a clear and unmistakable disavowal of scope
20 during prosecution." Computer Docking, 519 F.3d at 1374. It
21 may do so, quote, "by clearly characterizing the invention in
22 a way to try to overcome rejections based on prior art," end
23 quote. Same case. Petter explicitly limited the scope of its
24 vacuum pump in precisely this fashion. Petter argues that
25 this limitation applies only to the pump's location. However,

1 we've gone over that, but it relied not only on that fact, but
2 also on the fact that its vacuum pump acts indirectly upon the
3 liquid by evacuating a chamber and using the resulting air
4 pressure differential to draw the water to the filter, while
5 the Carter pump acts directly upon the liquid as it flows
6 through the pump en route to the filter.

7 "Prosecution disclaimer does not apply to ambiguous
8 disavowal." Computer Docking, 519 F.3d at 1375. A disavowal
9 is ambiguous, quote, "if the applicant simply describes
10 features of the prior art and does not distinguish the claimed
11 invention based on those features," end quote, or if the
12 specification, quote, "expressly defines a claim term and
13 'remarks made to distinguish claims from the prior art are
14 broader than necessary,'" end quote. 3M Innovative Properties
15 Company against Avery Dennison Corp., 350 F.3d 1365, 1373,
16 Fed. Circuit, 2003, quoting another case.

17 Neither circumstance was the case in Petter's
18 prosecution. Petter expressly distinguished its claimed
19 invention from the described features of the Carter patent.
20 Petter's distinguishing remarks regarding its vacuum pump were
21 not broader than necessary to distinguish the prior art, nor
22 did they limit a claim described more broadly in its
23 application. Consequently, the Court cannot give Petter's
24 "vacuum pump" a broader construction than Petter gave it when
25 it distinguished the prior art during prosecution. That's

1 Chimie, 402 F.3d at 1384. Now, just bear with me a minute
2 here.

3 Well, regarding the talk about the inventor's
4 testimony and the hypothetical posed to Mr. Petter, I'm not
5 going to concern myself with that because I think that the
6 intrinsic evidence in the prosecution of this particular
7 patent, '792 patent, is unambiguous. So there's no
8 augmentation from the inventor that cuts one way or the other
9 in my judgment. So for the foregoing reasons I'm going to
10 adopt the -- although if I were writing it myself, I probably
11 would have written it a little differently, but I'm going to
12 adopt the proposed construction submitted by Hydro.

13 That brings us to the motion for summary judgment,
14 and that, the parties agree that the construction that I just
15 gave should lead to summary judgment on the complaint for
16 Hydro. Just bear with me a minute.

17 Regarding the proposed construction by Petter and
18 the argument that it worked by suction, I think quite frankly
19 that that's the wrong use of the word "suction" under the
20 circumstances of this case. As we talked about before, for
21 example, if you had a spigot or you had water taken out of the
22 second chamber, there would be a movement of the water, and
23 that's the same thing that could occur with a motor in the
24 second chamber, but that does not amount to suction. That
25 amounts to gravity and water seeking its own level, which we

1 all learned about in probably the ninth-grade science class we
2 all had to take and I hated at the time.

3 But anyway, removing water from the second box
4 increases the flow rate, increases the velocity, but there
5 certainly is no vacuum and no space has been evacuated, no
6 gases have been evacuated from that chamber, so water moves
7 from one container to the other by virtue of the difference in
8 the weight of the water per unit. In other words, that's why
9 it evens out at five and a half gallons in my prior example.
10 I just don't get Petter's argument here.

11 But anyway, the action that is being talked about
12 here cannot be regarded as a vacuum. Moving the water from
13 the second container increases the flow rate, but any pump
14 regardless of the action would create suction as it's defined
15 by Petter. But that does not equate to a vacuum. That's true
16 no matter how broadly that's construed.

17 So regarding the complaint, summary judgment will be
18 entered on behalf of Hydro, and we will now go forward with
19 the counterclaims under the circumstances that I outlined
20 earlier; that is, that the parties get me the terms. Is
21 fourteen days -- that ought to be sufficient. I mean, you got
22 them to me already. You just have to nail down the ones that
23 you want.

24 Okay. We're adjourned.

25 (Proceedings concluded at 11:07 a.m.)

CERTIFICATE OF REPORTER

I, Kevin W. Gaugier, Official Court Reporter for the United States District Court for the Western District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct transcript of the proceedings had in the within-entitled and numbered cause on the date hereinbefore set forth.

I do further certify that the foregoing transcript was prepared by me.

/s/ Kevin W. Gaugier

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